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No. 75-1064

In the Supreme Court of the United States

OCTOBER TERM, 1975

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania, *Appellants*,

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated, *Appellees*.

Amicus Curiae Brief in Support of Appellants

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SUBJECT INDEX

	Page
I. Interest of Amicus	1
II. Questions Presented	2
III. Argument	3
A. The injunctive relief granted by the lower court is improper as being directed against entities neither named nor proper parties to the matter and as being violative of the principles of separation of powers	3
B. The lower court's holding that parents may not waive the constitutional rights of their minor children as to mental facility treatment is novel and misapplied	8
IV. Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Board of Liquidation v. McComb, 92 U.S. 531, 541 (1875)	7
Buckley, et al. v. Valeo, Secretary of the United States Senate, et al., ____ U.S. ____, 44 Law Week 4127 (Jan. 27, 1976)	6
Communist Party v. S.A.C. Board, 367 U.S. 1 (1961)	7
Dungan v. Sawyer, 250 F. Supp. 480 (1965)	4
Edelman v. Jordan, 415 U.S. 651 (1974)	5
Ex Parte Young, 209 U.S. 123, 156-158 (1908)	8
Fitts v. McGhee, 172 U.S. 516 (1899)	7, 8
Gideon v. Wainwright, 372 U.S. 335 (1963)	8
Goldberg v. Kelly, 397 U.S. 254 (1970)	8
Griswold v. Connecticut, 381 U.S. 479 (1965)	9
Heryford v. Parker, 396 F.2d 393, 396 (1968)	9
In re Gault, 387 U.S. 1 (1967)	11
Lochner v. New York, 198 U.S. 45, 49 (1905)	11
Marbury v. Madison, 1 Cranch 137, 177 (1803)	5, 6

	Page
Meyer v. Nebraska, 262 U.S. 390, 399 (1923)	10
Miranda v. Arizona, 384 U.S. 436 (1966)	8
Monroe v. Pape, 365 U.S. 167 (1961)	5
Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)	5
Preiser v. Rodriguez, 411 U.S. 475 (1973)	3
Red Bird v. Berry, 371 F. Supp. 727 (1973)	7
Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)	9
Stanley v. Illinois, 405 U.S. 645, 651 (1972)	9
United States ex rel v. Philadelphia, 413 F.2d 84 (1969)	5
Wisconsin v. Yoder, 406 U.S. 205 (1972)	11
Younger v. Harris, 401 U.S. 37 (1971)	7
Constitutions	
United States Constitution, Article IV, Section 4	6
United States Constitution, Amendment X	7
United States Constitution, Amendment XI	5
United States Constitution, Amendment XIV	10
Statutes	
Pennsylvania Mental Health and Mental Retardation Act of 1966, Sections 402, 403, 426	1
28 U.S.C., Section 2284(2)	4
42 U.S.C., Section 1983	3, 5
Texts	
The Federalist, G. P. Putnam's Sons ed. (1889)	6
The Federalist No. 47	6, 7
The Federalist No. 51	6
R. A. Rutland, The Birth of the Bill of Rights 1776-1791 (1955)	7

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Amicus Curiae Brief in Support of Appellants

I. Interest of Amicus

The state of Kansas sponsored by its Attorney General herein as an *amicus curiae* has statutory procedures for the voluntary admission of minors which are somewhat similar in scope to the Pennsylvania Mental Health and Mental Retardation Act of 1966, Sections 402, 403, and 426 in question in the above captioned matter. Also similarly, the Kansas procedures apply to admissions to private mental facilities as well as to state operated facilities.

Certainly no state should desire the unnecessary denial of rights or confinement of any of its citizenry

whether juvenile or adult. But with equal certainty no state should advocate the unnecessary extension of its judicial or police powers to disrupt family decisions of medical treatment for its children without an equally apparent benefit or protection to the child, family or society within that state. And with equal certainty no state should be forced to endure the disregarding of the separation of its branches of government and the breaching in abstentia of the immunities of those branches.

The *amicus* thus feels compelled to advise this Court of its position in favor of the Appellants' prayer that the decision of the lower court be reversed.

II. Questions Presented

This brief is confined to the following issues which the *amicus* considers to be the most crucial to its interests:

(1) Whether injunctive relief ordering or assuming actions of the legislative and judicial branches of a state government may be properly granted when only officials of the administrative branch of that state government are defendant parties in the matter before the Court.

(2) Whether a due process proceeding is a proper and complete substitute for parental and juvenile discretion in choosing mental facility inpatient treatment.

III. Argument

A. The Injunctive Relief Granted by the Lower Court Is Improper as Being an Improper Joinder of Remedies, as Being Directed Against Entities Neither Named nor Proper Parties to the Matter and as Being Violative of the Principles of the Separation of Powers.

The injunctive relief ordered by the lower court (Appendix to Jurisdictional Statement, pp. 103a-108a) is apparently a class action and prospective *habeas corpus* order upon that court's newly fashioned procedures and suddenly appended to a 42 U.S.C. §1983 civil rights action. It would be unduly simple, although probably correct, to state that such a joinder of remedies is improper in view of this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Indeed, the injunctive relief seems premised on the very assumptions discarded by this Court in the *Preiser* decision. The lower court apparently assumes that exhaustion of the state's release procedures or of *habeas corpus* proceedings is unnecessary without even formally considering such proceedings on the further assumption that such proceedings are inadequate and in need of proscription from the lower court. This hurried proscription is suddenly merged into a 42 U.S.C. §1983 action which originally included pleadings for monetary damages (see Appendix to Jurisdictional Statement, p. 16a) and by its very nature tends to involve more time than *habeas corpus* proceedings (see *Preiser v. Rodriguez*, 411 U.S. at 496).

In a larger sense the injunctive orders of the lower court seem to be painted by a broad brush which

obliterates many of the due process principles elsewhere contained in that opinion. The opportunity to be heard which is so carefully accorded to the children seems to be denied to their states. The named defendants of the matter are merely persons as individuals and as officials of the Department of Public Welfare or of the executive branch of the Commonwealth of Pennsylvania (see Ap. to J. S., pp. 1a, 4a, 5a-6a). Neither named nor brought in as parties are the commonwealth itself or its judicial and legislative branches of government. Yet powers and actions of these governmental branches are integral elements of the injunctive orders. The state judicial branch is to be notified of the order, is expected to conduct hearings pursuant to the order, and is to be reported on as to the progress of the hearings. The state legislature is expected to fund the increased obligations of those hearings. Indeed, the lower court blatantly acknowledges that it is acting in the legislative realm as it proclaims: "Until the legislature establishes some other procedure consonant with our opinion and order . . . " (see Ap. to J. S., p. 103a, see also p. 100a).

If the lower court considered the state judiciary and legislature so necessary to the adjudication of the matter, it could perhaps have joined them as parties on its own motion. See *Dungan v. Sawyer*, 250 F.Supp. 480 (1965). This was not done.

Surely it was not considered that an appearance of the state attorney general for named defendants or pursuant to 28 U.S.C. §2284(2) implies an entry of

appearance to waive the specific protections to the state of the Eleventh Amendment of the Constitution of the United States. As recently reiterated by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974):

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." [415 U.S. at 673, quoting from *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).]

It may also be questionable whether a state may be a proper party defendant in a 42 U.S.C. §1983 suit as a state may not be a "person" within the purview of that act. See *United States ex rel. v. Philadelphia*, 413 F.2d 84 (1969) and *Monroe v. Pape*, 365 U.S. 167 (1961).

The powers of judicial review of the federal judiciary have been recognized by this Court from early in this nation's history as being extensive.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. [*Marbury v. Madison*, 1 Cranch 137, 177 (1803).]

And the limits of that power are formed from the same constitution from which it derives.

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments are bound by that instrument. [*Marbury v. Madison*, 1 Cranch at 179.]

Among the basic provisions and doctrines of the Constitution is that of separation of powers.

> This Court has not hesitated to enforce the principles of separation of powers embodied in the Constitution when their application has proved necessary for the decisions of cases and controversies properly before it. [*Buckley et al. v. Valeo, Secretary of the United States Senate, et al.*, . . . U.S. . . ., 44 Law Week 4127 (Jan. 27, 1976).]

The *Buckley* decision also cites The Federalist Nos. 47 and 51 by Madison (The Federalist, G. P. Putnam's Sons ed. 1889) as to the importance of the separation of powers doctrine in the framing and the adoption of the Constitution. Implicit in The Federalist No. 47 is the recognition that the states in varying degrees had implemented that doctrine before the adoption of the Constitution. And the states did not surrender that doctrine with the adoption of the Constitution. [See Art. IV §4 of the Constitution of the

United States guaranteeing "every State in this Union a Republican Form of Government . . ." Note again The Federalist No. 47 indicating the importance of the separation of powers for the retention of such a form of government. See also Amendment X of the Constitution of the United States and R. A. Rutland, The Birth of the Bill of Rights 1776-1791 (1955).]

An order misdirected towards officials of only one branch of state government and involving powers and functions of another branch of state government is surely violative of the principles of separation of powers. See *Red Bird v. Berry*, 371 F. Supp. 727 (1973). Such an order must necessarily be constructed on the faulty base of anticipation of what the missing governmental branches may do and on an incomplete presentation of the issues. See *Younger v. Harris*, 401 U.S. 37 (1971) and *Communist Party v. S.A.C. Board*, 367 U.S. 1 (1961).

The lower court's injunctive order attempts to impart state administrative officials with responsibilities over the judicial and legislative branches. That order could direct the performance of ministerial duties by the defendants, but surely it cannot enlarge those duties or borrow powers from other governmental branches. See *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875). The defendants are not shown to have any close official connections to the operations, funding and legislation of civil procedures for the state judiciary. The jurisdictional limitations indicated by this Court in *Fitts v. McGhee*, 172 U.S.

516 (1899) and as more fully defined in *Ex Parte Young*, 209 U.S. 123, 156-158 (1908) would seem to deny jurisdiction for such an injunctive order. The *Fitts* decision did indicate that "exceptional or extraordinary circumstances" (172 U.S. at 533) could arise to temper the reasoning, but this case does not seem divorced from previously compelling cases which were able to recognize state separation of powers principles.

For example, the *Goldberg v. Kelly*, 397 U.S. 254 (1970) decision did not place major administrative or financial burdens upon agencies, branches, or persons other than those involved as parties to the matter. Nor did the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision. Even in the decision of *Gideon v. Wainwright*, 372 U.S. 335 (1963), affecting the procedures of Florida and of other states in not providing counsel for indigent criminal defendants, this Court's reversal and remand of the matter did not find it necessary to distort the state *habeas corpus* provisions—in a matter arising on an appeal of a denial of relief in *habeas corpus*. [See the remanded proceedings in *Gideon* in 153 So.2d 299 (1963).]

Surely the newly proclaimed rights of children are not superior to or violative of other constitutional protections.

B. The Lower Court's Holding that Parents May Not Waive the Constitutional Rights of Their Minor Children as to Mental Facility Treatment Is Novel and Misapplied.

The determinations of the lower court attempts to find and protect new rights of minor children by

diminishing parental rights and obligations and by increasing the involvements of the state. The parental rights to raise one's children so extensively recognized in this Court's decision of *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) are reduced for a continuing and pervasive state intervention of the very nature which was looked upon with disfavor in *Stanley, supra.*

The clear effect of the opinion and order of the lower court is to destroy the concept of voluntary admissions or commitments of juveniles to mental health facilities, both public and private. The primary reasons for such actions seem based upon the loss of liberty and the stigma often attached to treatment at such facilities (Ap. to J. S., p. 34a n. 8). The prescription of a full set of commitment hearings may be more harmful and disruptive than the previous ills. Social stigma is hardly lessened by a required set of judicial hearings almost guaranteed to resemble criminal or delinquency proceedings [see *Heryford v. Parker*, 396 F.2d 393, 396 (1968).]

As noted in the concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965):

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v.*

Massachusetts, 291 U.S. 97, 105. (381 U.S. at 493.)

This Court recognized in *Meyer v. Nebraska* [262 U.S. 390, 399 (1923)] . . . that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. (381 U.S. at 495.)

The opinion of the lower court seems to employ the novel presumption that parents will abuse those rights because of a conflict of legal interests. The proposed procedures would cure that conflict by essentially removing the rights of the parent and not actually increasing the rights of the child, but rather increasing the intervention of the state through its judiciary. During the proposed hearings the child is cut off from parental decisions and guidance as to his rights. The only proscribed rights of the parents in the process is that they "may initiate the temporary detention of a child eighteen years of age or younger in a mental health or mental retardation facility if the procedures and requirements of our opinion and order are fully complied with" (Ap. to J. S., p. 101a). The child is not allowed to waive any of the so-called rights and the full hearing process without the acceptance of the neutral tribunal (Ap. to J. S., p. 102a). In essence that tribunal becomes the custodian of the former parental powers of waivers or rights. The child is still without a direct or unfettered ability to accept or reject the facility detention. And because the lower court does not accord any right or access of appeal

from the decisions of that tribunal, it is equally, if not more, the unchecked arbiter of the child's rights than were his parents. So the premise of the lower court's order becomes not just a check on potential parental abuses but that substitution of a judicial tribunal for parental authority is desirable because due process is per se more desirable than parental discretion.

This is not a contention that children should have no rights or remedies against parental abuse, nor that children should not have rights or access to counsel [see *In re Gault*, 387 U.S. 1 (1967)] or some form of ombudsman or medical review as a protection against abuses. But it is a contention that a greater concern that the lower court's order creates an undue and unwarranted extension of the state's police powers to grossly interfer with parental decisions before such individual decisions are even contended to be harmful to the child. See *Lochner v. New York*, 198 U.S. 45, 49 (1905) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the well chosen words of the dissent of the lower court opinion it does seem that the lower court has ordered a compulsory "overdose of due process" which is not beneficial to the parents or the children. (See Ap. to J. S., p. 52a.)

IV. Conclusion

Even if it were assumed *arguendo* that parents could not waive or determine the rights of their minor children as to mental facility inpatient treatment, the

forced intervention of non-party state branches of government would remain an improper violation of numerous constitutional guarantees. And an adversary proceeding forced between parent and child is conducive to neither the best protections of the child's rights nor the sheltering of the child from social stigma. In view of these implications, the *amicus* urges this Court to reverse the decision of the lower court.

June, 1976.

Respectfully submitted,

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